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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

A. A. & M. CARTING SERVICE, INC.; FARMINGDALE CARTING, INC.; NATALE PEPE WASTE CORP.; PGS CARTING CO., INC.; JOSEPH S. CELANO; MARIANNE CELANO; JC INDUSTRIES, INC.; C.B.S. RUBBISH CO., INC.; FARMINGDALE INDUSTRIAL PARK ASSOCIATION; MINERSFUEL COMPANY, INC.; and RESOURCES CONSERVATION CORP.,

Petitioners,

vs.

TOWN OF BABYLON, NEW YORK, COMMERCIAL GARBAGE DISTRICT NO. 2, also known as Commercial Waste Collecting and Recycling District; TOWN BOARD OF THE TOWN OF BABYLON; RICHARD H. SCHAFFER; and BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The New York State Conference of Mayors and Municipal Officials ("NYCOM") respectfully moves this Court, pursuant to Rule 36.3, for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case. The consent of attorney for the petitioners has been obtained. The consent of attorneys for the respondents was requested and received.

NYCOM is a not-for-profit, voluntary membership association for the cities and villages of the State of New

York, which has as its goal the promotion of efficient municipal government. NYCOM's current membership consists of all of the State's 62 cities and 496 of its 558 villages, thereby representing the great majority of such municipalities.

In cooperation with cities and villages, NYCOM advocates and supports legislation, participates in litigation and provides information and education beneficial to the administration of municipal affairs and opposes legislation detrimental to cities and villages and the people therein. NYCOM also has a vital interest in the outcome of this and other cases dealing with the issue of flow control because such decisions have begun to chip away at the United States Supreme Court decision in *C & A Carbone, Inc. v. Town of Clarkstown,* 114 S. Ct. 1677, 399 L.Ed.2d 128 (1994) with the ultimate and substantial effect of depriving NYCOM members of the ability to contract freely for solid waste disposal services inside and outside of New York. This ability to contract freely is essential to the effective functioning of local governments.

NYCOM has, on numerous occasions, expressed its opposition to flow control legislation to the former and current governors of New York State and to the State's legislative and congressional members. On March 1, 1995 and March 23, 1995 NYCOM Executive Director Edward C. Farrell delivered testimony before the U.S. Senate Subcommittee on Superfund, Waste Control and Risk Assessment, and the U.S. House of Representatives Subcommittee on Commerce, Trade and Hazardous Materials, respectively, on the issue of congressional authorization of flow control. Amicus App. A-1 and A-11.

Opposition to federal and state legislation which would authorize enactment of flow control provisions is a prominent plank of NYCOM's 1996 Legislative Program. NYCOM's primary aim is to safeguard those municipalities and public agencies obtaining "flow control" powers from using them to raise general fund revenues by mandating the disposal of solid

waste at "tipping fee" rates higher than the municipalities' actual disposal costs.

The authority to enact local flow control legislation has been granted to nearly half of New York's counties and to a smaller number of towns, cities and villages. NYCOM members represent that level of government most directly involved in the collection of solid waste, and which thereby are most directly affected by flow control legislation.

NYCOM was an *amicus curiae* in the case of *Town of North Hempstead v. Village of Westbury*, 618 N.Y.S.2d 226 (N.Y. App. Div. 1994), *appeal withdrawn*, 647 N.E.2d 455 (N.Y. 1995) which involved the constitutionality of a flow control ordinance in the Long Island, New York town of North Hempstead. Most notably, NYCOM was among the *amici curiae* in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 399 L.Ed.2d 128 (1994) in which the United States Supreme Court invalidated a flow control scheme virtually identical to the one at issue in the present case.

In the months following the *Carbone* decision we have witnessed three decidedly different courses of conduct. On the positive side, the *Carbone* decision provided cities and villages with what they were seeking at the beginning: a seat, as well as a voice, at the negotiating table. In other cases, it resulted in lower and more responsible rates for garbage disposal. Where the *Carbone* decision was adhered to, we saw the return of competition to the garbage disposal business as those who previously used flow control for their own economic gain were forced to reevaluate their finances.

The negative course of conduct has included various attempts to undermine, circumvent, and subvert the *Carbone* decision, either by ignoring the decision of this Court, or by enacting a new regulatory/contractual scheme such as in the Town of Babylon. While in some cases, the failure to adhere to *Carbone* can be blamed on ignorance, in most cases, this failure has been deliberate.

The third course of conduct was undertaken by proponents of flow control who heeded Justice O'Connor's concurrence in *Carbone*, and mounted a fierce congressional campaign to authorize states to permit flow control legislation. Proponents enjoyed a major victory when the U. S. Senate passed a bill on May 16, 1995 - the first anniversary of the *Carbone* decision. However, this effort, which spanned almost two years, was brought to an end on January 31, 1996 when the House of Representatives rejected flow control by a 272-149 vote.

This case raises an important issue for NYCOM members. NYCOM represents that level of government - cities and villages - most directly involved in the collection of solid waste, and thereby the most directly affected by flow control. Flow control has been hailed by some as a necessary planning tool guaranteeing a steady flow of waste to a specific solid waste facility to finance the costs of that facility. In most cases, it is NYCOM's members which are subsidizing these expensive facilities through corresponding increases in the local real property tax. Traditionally, local governments in New York rely upon the local real property tax as their main source of revenue and the primary method for financing solid waste disposal. Approximately 65 percent of the cities and villages are currently financing their disposal costs through municipal taxes, while another 15 percent impose user fees. Flow control adds unnecessary spending to a city or village's bottom line. While in New York, counties and some towns are legislatively charged with solid waste planning, that charge does not require that the county or town become the ultimate disposal site for all of the garbage generated within the jurisdiction. Additionally, flow control deprives local governments of the ability to contract freely for solid waste disposal services inside and outside of New York. This ability to contract freely is essential to the effective functioning of local governments.

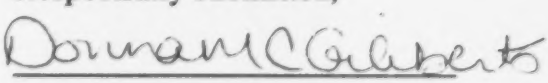
The judgment below, if allowed to stand, will act as a "green light" to the owners and operators of solid waste facilities to continue to flaunt the Court's decision in

Carbone, despite the recent action of Congress. Without further direction, the Court can anticipate that the district and appellate courts will continue to carve out exceptions to *Carbone* based upon local situations and conditions. We respectfully suggest that the Court cannot permit flow control proponents to evade *Carbone* through the "backdoor" when Congress has clearly chosen not to provide this authority through the legislative "front door".

NYCOM submits that the judgment below is wrong and, unless reversed, will provide a road map to municipalities seeking to evade the *Carbone* decision and to continue to force trash to go to a local facility.

NYCOM therefore urges this Court to grant the petition for certiorari in this case and to accept the attached brief to assist the Court in its resolution of this matter.

Respectfully submitted,



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INTEREST OF *AMICUS CURIAE*

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administration of municipal affairs and opposes legislation detrimental to cities and villages and the people therein.

NYCOM has a vital interest in the outcome of this and other cases dealing with the issue of flow control in the *post-Carbone* era since NYCOM members represent that level of government most directly involved in the collection of solid waste, and which thereby are most directly affected by flow control legislation. NYCOM was among the *amici curiae* in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 399 L.Ed.2d 128 (1994).

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The third course of conduct was undertaken by proponents of flow control who heeded Justice O'Connor's concurrence in *Carbone*, and mounted a fierce congressional campaign to authorize states to permit flow control legislation. Proponents enjoyed a major victory when the U. S. Senate passed a bill on May 16, 1995 - the first anniversary of the *Carbone* decision. However, this effort, which spanned almost two years, was brought to an end on January 31, 1996 when the House of Representatives rejected flow control by a 272-149 vote.

This case raises an important issue for NYCOM members. NYCOM represents that level of government - cities and villages - most directly involved in the collection of solid waste, and thereby the most directly affected by flow control. Flow control has been hailed by some as a necessary planning tool guaranteeing a steady flow of waste to a specific solid waste facility to finance the costs of that facility. In most cases, it is NYCOM's members which are subsidizing these expensive facilities through corresponding increases in the local real property tax. Traditionally, local governments in New York rely upon the local real property tax as their main source of revenue and the primary method for financing solid waste disposal. Approximately 65 percent of the cities and villages are currently financing their disposal costs through municipal taxes, while another 15 percent impose user fees. Flow control adds unnecessary spending to a city or village's bottom line. While in New York, counties and some towns are legislatively charged with solid waste planning, that charge does not require that the county or town become the ultimate disposal site for all of the garbage generated within the jurisdiction. Additionally, flow control deprives local governments of the ability to contract freely for solid waste disposal services inside and outside of New York. This ability to contract freely is essential to the effective functioning of local governments.

SUMMARY OF ARGUMENT

The *amicus* will argue that Congress has spoken and that despite their best efforts, there will be no legislative solution for flow control proponents. As a result of Congress' defeat of a flow control authorization bill, it is now more important than ever that the Court not permit localities to flaunt its' decision in *Carbone*. What Congress and this Court would not allow through the front door should not be accomplished through the back door by localities and the lower courts.

Additionally, the *amicus* will argue that since this Court's decision in *Carbone* on May 16, 1994, many local governments, including the Town of Babylon, have recognized that their local laws directing solid waste to a specific facility are

invalid under the Commerce Clause, and have sought to find new ways to defray their financial commitments to the operators of local solid waste management facilities. Rather than pursue the politically unpopular solution offered by the Court in the form of general taxes or municipal bonds, municipalities like the Town of Babylon have chosen to perpetuate a regime that continues to direct solid waste to a chosen facility.

Certain of the district and appellate courts have been sympathetic to the arguments presented by municipalities like the Town of Babylon. Such a posture has resulted in piecemeal and inconsistent application of *Carbone*. The *amicus* will argue that the Court needs to send a clear message to the district and appellate courts which have upheld local waste flow plans that replace local laws of the type invalidated in *Carbone* with regulatory requirements and/or contractual schemes designed to ensure that local waste continues to go to a local disposal facility.

ARGUMENT

I

CONGRESS' DEFEAT OF FLOW CONTROL REQUIRES THIS COURT TO ADDRESS LOCAL GOVERNMENT EVASION OF *CARBONE*

When this Court held the Town of Clarkstown's flow control ordinance constitutionally invalid under the Commerce Clause in the *Carbone* decision, it provided, in a concurring opinion written by Justice O'Connor, an opportunity for a legislative solution to flow control. In Justice O'Connor's words: "It is within Congress' power to authorize local imposition of flow control. Should Congress revisit this area, and enact legislation providing a clear indication that it intends States and localities to implement flow control, we will, of course, defer to that legislative judgment." *Carbone*, supra at 1692.

Shortly after this Court issued the *Carbone* decision, flow control proponents mounted a fierce campaign for legislation

providing congressional authorization for states to implement flow control. On the one-year anniversary of the *Carbone* decision - May 16, 1995 - the U. S. Senate passed flow control authorization legislation grandfathering waste facilities built or planned with flow control at the time of this Court's decision in *Carbone*. S. 534, 104rd Cong., 1st Sess. (1995). Efforts in the U.S. House of Representatives to introduce an identical bill failed and a narrow bill which would grandfather facilities existing or financed at the time of the *Carbone* decision was introduced. A House of Representatives resolution providing for the consideration of the Senate bill was defeated in the House on January 31, 1996 by a vote of 272-149. H.R. Res. 349, 104th Cong., 2d Sess. (1996).

The House of Representatives' defeat of a legislative solution to flow control sends a strong message to the 104th Congress that flow control legislation is unnecessary and not forthcoming in the near future.

Inasmuch as Congress' action has foreclosed a legislative solution to flow control, it can be expected to heighten the activity of flow control proponents to craft new and additional regulatory and/or contractual solutions and to seek support for these mechanisms through the courts. For this reason it is vital that the Court grant this petition and address local government evasion of its decision in *Carbone.* Without such action at this time, the Court can be assured that the issue of flow control will continue to consume the time and effort of the lower courts, as well as this Court's calendar with petitions for writs of certiorari.

II

INCONSISTENT LOWER COURT DECISIONS ON FLOW CONTROL REQUIRE THIS COURT TO CLARIFY ITS HOLDING IN *CARBONE*

Since this Court's decision in *Carbone*, there has been a plethora of cases in the federal district and appellate courts dealing with the constitutional validity of waste management

plans of states and localities. To date, the *Carbone* decision has been cited as authority in at least 15 reported federal opinions[1] dealing with Commerce Clause challenges and at least six reported state court opinions[2] dealing with solid waste issues and Commerce Clause challenges. Of these 21 decisions, 15 occurred in the flow-control setting; of those, six distinguished *Carbone* or questioned its application in

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[1] *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders,* 48 F.3d 1417 (3d Cir. 1995); *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County,* 867 F.Supp. 1430 (D. Minn. 1994); *Blue Circle Cement, Inc. v. Board of County Comm'rs,* 27 F.3d 1499 (10th Cir. 1994); *Bonollo Rubbish Removal, Inc. v. Town of Franklin,* 886 F. Supp. 955 (D. Mass. 1995); *Environmental Waste Reductions, Inc. v. Reheis,* 887 F. Supp. 1534 (N.D. Ga. 1995); *Grand Central Sanitation, Inc. v. City of Bethlehem,* 1994 WL 613674 (E.D. Pa. 1994); *Harvey & Harvey, Inc. v. County of Chester,* 68 F.3d 788 (3d Cir. 1995), *petition for cert. filed,* 64 U.S.L.W. 3510 (U.S. Jan. 16, 1996) (No. 95-1127); *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson,* 48 F.3d 391 (9th Cir. 1995), *cert. denied,* 115 S. Ct. 2580 (1995); *National Solid Waste Management Ass'n v. Meyer,* 63 F.3d 652 (7th Cir. 1995), *petition for cert. filed,* 64 U.S.L.W. 3486 (U.S. Dec. 18, 1995) (No. 95-1079); *National Solid Waste Management Assoc'n v. Williams,* 877 F. Supp. 1367 (D. Minn. 1995); *Pine Ridge Recycling, Inc. v. Butts County, Georgia,* 855 F. Supp. 1264 (M.D. Ga. 1994); *Southcentral Pennsylvania Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Authority,* 877 F. Supp. 935 (M.D. Pa. 1994); *SSC Corp. v. Town of Smithtown,* 66 F.3d 502 (2d Cir. 1995), *cert. denied,* 64 U.S.L.W. 3380 (U.S. Feb. 20, 1996) (No. 95-782); *USA Recycling, Inc. v. Town of Babylon,* 66 F.3d 1272 (2d Cir. 1995), *petition for cert. filed,* 64 U.S.L.W. 3534 (U.S. Jan. 30, 1996) (No. 95-1223); *Vince Refuse Service, Inc. v. Clark County Solid Waste Management Dist.,* No. C-3-93-319, 1995 WL 253121 (S.D. Ohio).

[2] *Town of Clarkstown v. C & A Carbone, Inc.,* 617 N.Y.S.2d 482 (N.Y. App. Div. 1994); *Davis Clarkco Landfill Co. v. Clark Cty Solid Waste Management Dist.,* 653 N.E.2d 646 (Ohio 1995); *Delaware County v. Raymond T. Opdenaker & Sons, Inc.,* 652 A.2d 434 (Pa. Commw. Ct. 1994); *Empire Sanitary Landfill, Inc. v. State,* 645 A.2d 413 (Pa. Commw. Ct. 1994); *Town of North Hempstead v. Village of Westbury,* 618 N.Y.S.2d 226 (N.Y. App. Div. 1994), *appeal withdrawn,* 647 N.E.2d 455 (N.Y. 1995); *R & R Disposal Carting, Inc. v. Town of Clarkstown,* 620 N.Y.S.2d 215 (N.Y. 1994).

upholding state and municipal flow-control schemes[3], while nine decisions followed *Carbone* in recognizing challenges to waste-flow laws[4]. The remaining six cases dealt with solid waste issues generally; of these, two distinguished or declined to apply *Carbone* in turning aside challenges to the waste plans at issue[5], while four opinions cited *Carbone* in recognizing challenges to the solid waste plans.[6]

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[3] *Harvey & Harvey, Inc. v. County of Chester,* 68 F.3d 788 (3d Cir. 1995), *petition for cert. filed,* 64 U.S.L.W. 3510 (U.S. Jan. 16, 1996) (No. 95-1127); *SSC Corp. v. Town of Smithtown,* 66 F.3d 502 (2d Cir. 1995), *cert. denied,* 64 U.S.L.W. 3380 (U.S. Feb. 20, 1996) (No. 95-782); *USA Recycling, Inc. v. Town of Babylon,* 66 F.3d 1272 (2d Cir. 1995), *petition for cert. filed,* 64 U.S.L.W. 3534 (U.S. Jan. 30, 1996) (No. 95-1223); *Vince Refuse Serv., Inc. v. Clark County Solid Waste Management Dist.,* No. C-3-93-319, 1995 WL 253121 (S.D. Ohio 1995); *Grand Central Sanitation, Inc. v. City of Bethlehem,* No. 94-59-28, 1994 WL 613674 (E.D. Pa. 1994); *Delaware County v. Raymond T. Opdenaker & Sons, Inc.,* 652 A.2d 434 (Pa. Commw. 1994).

[4] *National Solid Wastes Management Ass'n v. Williams,* 877 F. Supp. 1367 (D.Minn. 1995); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders,* 48 F.3d 701 (3d Cir. 1995)1 *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County,* 867 F. Supp. 1430 (D. Minn. 1994); *Bonollo Rubbish Removal, Inc. v. Town of Franklin,* 886 F. Supp. 955 (D. Mass. 1995); *Southcentral Pennsylvania Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.,* 877 F. Supp. 935 (M.D. Pa. 1994); *R & R Disposal Carting, Inc. v. Town of Clarkstown,* 620 N.Y.S. 2d 215 (N.Y. 1994); *Town of Clarkstown v. C & A Carbone, Inc.,* 617 N.Y.S.2d 482 (N.Y. App. Div. 1994); *Town of North Hempstead v. Village of Westbury,* 618 N.Y.S.2d 226 (App. Div. 1994); *Empire Sanitary Landfill, Inc. v. State,* 645 A.2d 413 (Pa. Commw. Ct. 1994).

[5] *Kleenwell Biohazard Waste & General Ecology Consultants, Inc. v. Nelson,* 48 F.3d 391 (9th Cir.), *cert. denied,* 115 S. Ct. 2580 (1995); *Blue Circle Cement, Inc. v. Board of County Comm'rs,* 27 F.3d 1499 (10th Cir. 1994).

[6] *National Solid Wastes Management Ass'n v. Meyer,* 63 F.3d 652 (7th Cir. 1995), *petition for cert. filed,* 64 U.S.L.W. 3486 (U.S. Dec. 18, 1995) (No. 95-1079); *Environmental Waste Reductions, Inc. v. Reheis,* 887 F. Supp. 1534 (N.D. Ga. 1994); *Pine Ridge Recycling, Inc. v. Butts County,* 855 F. Supp. 1264 (M.D. Ga. 1994); *Davis Clarkco Landfill Co. v. Clark County Solid Waste Management Dist.,* 653 N.E.2d 646 (Ohio 1995).

Of those rejecting *Carbone,* the most notable is the present case, which deals with the creation by the Town of a commercial garbage district within its boundaries which licensed a single private company to collect all waste generated within this new district pursuant to a contract with the Town. The appellate court reversed the lower court and ruled that the Town's plan did not discriminate against or impose any undue burden on interstate commerce.

This Court has clearly established a two-step process for evaluating the validity of a statute under the Commerce Clause. *Carbone*, 114 S.Ct. 1677; *Oregon Waste System v. Department of Environmental Quality,* 114 S. Ct. 1345, 1347 (1994). In a Commerce Clause challenge, the burden is initially on the plaintiff to show that the legislation is discriminating against interstate commerce on its face or in its purpose and effect. *Hughes v. Oklahoma,* 441 U.S. 322, 336, 99 S. Ct. 1727, 1736, 60 L.Ed.2d 250 (1979). The first step of the evaluation is to determine whether the regulation of interstate commerce discriminates against interstate commerce or favors in-state economic interests over their out-of-state counterparts. *Carbone,* 114 S. Ct. at 1682; *Oregon Waste System,* 114 S. Ct. at 1347. If an ordinance so discriminates, it is virtually *per se* invalid unless the municipality can show that the ordinance advances a "legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives;" such purposes are to be strictly scrutinized by the Court. *Oregon Waste System*, 114 S. Ct. at 1347.

In addition, when it is shown that a law was enacted with a purpose to discriminate against interstate commerce, strict scrutiny is also required. A regulation may be discriminatory on its face, in its purpose or effect. *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 270, 104 S. Ct. 3049, 3054-55, 82 L.Ed.2d 200 (1984); *Philadelphia v. New Jersey,* 437 U.S. 617, 98 S. Ct. 2531, 57 L.Ed.2d 475 (1978); *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 352-53, 97 S. Ct. 2434, 2446-47, 53 L.Ed.2d 383 (1977).

If a regulation is not discriminatory, but rather regulates evenhandedly, then the Court must apply the *Pike* balancing

test and determine whether the burden on interstate commerce is clearly excessive in relation to the putative local benefits. *Carbone, 114 S. Ct. at 1682; Oregon Waste System,* 114 S. Ct. 1347; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L.Ed.2d 174 (1970).

It is submitted that in the present case, the court, while using the two-part analysis, sought to carve out an exception for the subject municipal scheme by stretching the envelope of analysis as outlined in the aforementioned cases.

Inasmuch as the Court of Appeals decision in the present case - as well as the inconsistent opinions of other federal courts on post-*Carbone* flow control cases - provides municipalities with a framework for evading this Court's decision in *Carbone*, granting of this petition and review of the judgment of the Court of Appeals is necessary.

CONCLUSION

For the reasons stated above, this Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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March 1, 1996

APPENDIX

Testimony of Edward C. Farrell
Executive Director
New York State Conference of Mayors
and Municipal Officials

INTERSTATE TRANSPORTATION OF SOLID WASTE AND FLOW CONTROL

Hearing before the

United States Senate Committee on
Environment and Public Works
Subcommittee on Superfund, Waste Control
and Risk Assessment

Subcommittee Chairman: Sen. Robert C. Smith
Ranking Minority Member: Sen. Frank Lautenberg

Wednesday, March 1, 1995
9:00 o'clock a.m.
Dirksen Senate Office Building
Room 406
Washington, D.C.

I am Edward C. Farrell, Executive Director of the New York State Conference of Mayors and Municipal Officials (NYCOM), which represents villages and cities in New York State.

I wish to extend my thanks to Senator Robert C. Smith, Chairman of the Senate Subcommittee on Superfund, Waste Control and Risk Assessment and to Senators Lautenberg, Chafee and Baucus, and to all of the members of the Committee and Subcommittee for the opportunity to offer testimony at this hearing exploring the issue of flow control.

I am testifying before you today because NYCOM represents that level of local government - cities and villages - most directly involved in the collection of solid waste, and thereby the most directly affected by flow control. Accordingly, we have a very different view of flow control than you may have heard from national local government associations.

Therefore, I want to state for the record, that the New York State Conference of Mayors opposes the imposition of flow control. Further, we ask that this Subcommittee and Congress take no action with regard to the imposition of flow control.

As you know, flow control refers to the statutory authority of a planning unit or municipality to exercise control over the flow of solid waste generated, originated, or brought within its jurisdiction. In the case of a county, multi-county, or regional facility, jurisdiction is granted over the flow of solid waste in the cities, towns and villages in that county. In the case of a town, jurisdiction is granted over the flow of solid waste in the villages in that town.

Flow control is not a new issue in New York. Since 1975, the New York State Legislature has enacted 38 special state laws enabling localities and solid waste management planning units to enact local flow control laws.

Flow control has been hailed by some as a necessary planning tool guaranteeing a steady flow of waste to a specific solid waste facility to finance the costs of that facility. In most cases, it is NYCOM's members - cities and villages - which are subsidizing these expensive facilities through corresponding increases in the local real property tax.

The issue of flow control came to the forefront in May, 1994 when the United States Supreme Court issued a sweeping decision which invalidated flow control legislation as violative of the Commerce Clause of the U.S. Constitution.

NYCOM served as an amicus curiae, along with the Long Island villages of Westbury, Mineola, and New Hyde Park, in *C & A Carbone, Inc. v. Town of Clarkstown,* on behalf of the hauler. We became involved in that case because our members are actively involved in the collection of solid waste, and thereby the most directly affected by flow control.

Traditionally, local governments in New York rely upon the local real property tax as their main source of revenue and the primary method for financing solid waste disposal. Approximately 65 percent of the villages and cities are currently

financing their disposal costs through municipal taxes, while another 15 percent impose user fees.

Flow control adds unnecessary spending to a village or city's bottom line. While in New York, counties and some towns are legislatively charged with solid waste planning, that charge does not require that the county or town become the ultimate disposal site for all of the garbage generated within the jurisdiction.

The cost and its effect on municipal budgets can best be illustrated by the following examples.

The Phantom Facility

Beginning in 1986 and continuing to date, the Long Island villages of Westbury, Mineola and New Hyde Park, which maintain their own municipal sanitation collection departments, plus three other sizable villages with similar operations and about 25 other villages of varying sizes, which utilize private carters or public sanitary districts to collect residential solid waste, have been subjected to the Town of North Hempstead's Flow Control Law. The Town imposed, and the Town Solid Waste Authority receives, tipping fees for all solid waste collected by the villages and other public and private solid waste collectors. These fees have no necessary or legal relationship to the Authority's actual disposal functions and costs. The fees act as a revenue stream, transferring up to $2 million per year to the Town.

Even though flow control is usually justified in the name of financing construction of solid waste facilities adequate to a municipality's long term needs, the Town and Authority never implemented the original plan to build its own solid waste facility after five years of flow control. The Town and the Authority abandoned all such plans in early 1992 and subcontracted all solid waste functions, even though they had spent two and one-half years developing the plan, purchased 460-acres of property for $34 million, and pledged tipping fee revenues in a secured bank loan.

The end result is that these Long Island villages have experienced tipping fee increases from $66 per ton in 1990 to $104 per ton in 1992.

The villages and others in North Hempstead have been isolated from the solid waste disposal market and have been precluded from dealing with other governmental and private entities - such as American Ref-Fuel located in the neighboring Town of Hempstead - which would provide disposal services at a cost of at least $15 to $30 per ton below the Town's monopoly rates.

When the three villages defied North Hempstead's flow control law by contracting with American Ref-Fuel, they were subsequently sued by North Hempstead. NYCOM served as an amicus curiae in that case. Ultimately, the Court of Appeals upheld the validity of the State and Town of North Hempstead flow control laws.

The Village of Monticello

In 1992 Sullivan County was granted flow control. This was done to ensure that Sullivan County would capture all of the business within the county in order to make payments on the landfill construction bonds.

Due to its proximity to Pennsylvania and other solid waste landfills, the Village of Monticello has access to markets where tipping fees range from $25 to $40 per ton. Presently, Sullivan County charges $60 per ton to use the county landfill.

The Village of Monticello is now paying a tipping fee of $360,000 per year to the county. Costs continue to rise and required the Village Board to double the commercial sanitation rate and institute a monthly residential sanitation fee to cover tipping fee costs.

The bottom line is that flow control deprives local governments of a basic tenet of municipal home rule authority: the ability to make decisions on the local level in the best interest of the local citizenry. The ability to contract freely is essential

to the effective functioning of local governments. Municipal officials have a fiduciary duty to negotiate contracts and spend local funds judiciously, in accordance with our State Constitution. Municipal officials are constrained by the competitive bidding provisions of the New York State General Municipal Law. These provisions assure the prudent and economical use of public moneys for the benefit of all the inhabitants of the state and facilitate the acquisition of facilities and commodities of maximum quality at the lowest possible cost. Flow control flies in the face of these provisions and replaces them with a costly, inefficient, and anti-competitive mandate.

In May 1992 NYCOM called the attention of the State Legislature and the Governor to three bills which would grant flow control to specific counties. At that time, we stated that none of the special laws enacted to date, nor the three bills which were before the Legislature, provided local governments within those counties or towns any safeguards or protection from abuse of that flow control authority. We asked that future special state laws authorizing municipal flow control provide local governments within those jurisdictions with protection against price gouging, provide municipalities the authority to honor existing contracts with waste haulers, and require formal prior notification and negotiation between the level of municipal government seeking flow control and the localities within that jurisdiction. Neither the Legislature nor the Governor addressed our concerns before these bills were enacted.

Mr. Chairman, you will hear many groups and individuals testify today. Several will suggest that by striking down the Clarkstown law, the Supreme Court created a crisis for municipally-operated solid waste facilities. Perhaps it is more appropriate to question why in the 70's and 80's did states embark on policies to build facilities which are backed by revenue bonds, only to find out that these facilities are uncompetitive in the open marketplace of the 90's?

I submit, Mr. Chairman, that the crisis that many in the solid waste community perceive we are in today was in fact

created by particular State policies concerning solid waste. In New York, the perceived need for flow control was precipitated by the State's active policy to close landfills.

Since 1986, there has been a net loss of 244 landfills, or 83 percent of the active landfills. In 1993 alone, 35 landfills closed. There were 50 municipal solid waste landfills remaining in New York as of December 31, 1993. During approximately the same period, roughly 12 new landfills were opened.

We must not forget that in 1988, the New York State Department of Environmental Conservation re-wrote its regulations concerning solid waste disposal. At that time DEC boasted of the fact that the new regulations were now the most stringent in the county - and accordingly disposal costs would increase by 1/3. Having the cadillac of regulations may work in a monopoly, but perhaps they are not well suited to a free enterprise situation.

What are the alternatives now that the U.S. Supreme Court has held that flow control laws violate the Commerce Clause? The Court noted that if special financing were needed to ensure a transfer station's survival, the municipality may subsidize the facility through general taxes or municipal bonds. But, the Court said, having elected to use the open market to earn revenues for a project, a municipality may not employ discriminatory regulation to give that project an advantage over rival businesses from out of state.

What is the effect of the *Carbone* decision in New York State? A number of planning units have reduced tipping fees to a competitive level to retain current business and attract new customers. In the case of solid waste authorities, several are actively negotiating with the municipalities under their jurisdiction to subsidize their costs and foster cooperation. Some planning units and municipalities have chosen to ignore the high court's decision and are continuing to enforce flow control. They are facing lawsuits by industry and others.

We understand that there are two legislative initiatives in Congress which address the issue of flow control authorization.

The first bill, H.R. 24 (Smith/Pallone) / S. 398 (Lautenberg) would "grandfather" local laws, plans or agreements containing flow control authority that existed prior to May 15, 1994, the date of the *Carbone* decision. This legislation is very broad as it would provide protection to some facilities that did not even exist or were not planned prior to May 15, 1994. Pursuant to this bill, a community would have three years to designate a facility, and then an unspecified amount of time to construct it, after which flow control could be chosen by the local government in perpetuity. Additionally, this proposal provides that up to 49% of flow control revenues can be used for municipal services unrelated to municipal solid waste management.

The second initiative, the Richardson/Fields amendment of 1994, is more restrictive, and would grandfather only those facilities that were actually constructed or for which permits were obtained and contracts executed for construction, or for which revenue bonds were sold prior to May 15, 1994. Pursuant to this proposal, flow control authority would last only for the life of the facility that was built or in development before May 15, 1994. After that time, free market principles would apply.

We support neither of these proposals. We ask that this Subcommittee and Congress take no action with regard to the imposition of flow control. We ask that Congress take no action on the aforementioned proposals.

The end of flow control does not mean the end of municipally-operated solid waste facilities. It does, however, mean the end of monopolistic prices for waste services and the return to a free market system. The *Carbone* decision is but nine months old, it is premature to do anything but assess its effects nationwide.

The real issue that needs to be addressed is how do we retire the bonds that have been issued on the debt of uncompetitive facilities? If Congress enacts flow control, and New York State follows suit, bonds issued for New York facilities will continue to be retired by increases in the local real property tax. This is a practice which we find unacceptable. There are alternatives such as state subsidies which could make up the difference between what is viable in the marketplace and the funds necessary to retire the debt.

State financial assistance for solid waste facilities is not unprecedented. In the past, New York State has provided funds for the construction of such facilities. It would not be extraordinary for New York to use state funds to retire the bonds on these same facilities. The assistance would not have to be 100 percent of the outstanding debt, but could rather reflect the difference between a competitive tipping fee and the outstanding obligation. The State offers a broad tax base from which to help finance such a program, including various income, corporate, sales and business use taxes, to name a few. Of course, if the federal government is interested in providing funds for this purpose, we would be most appreciative.

It is clear that bonds issued on the debt of uncompetitive facilities cannot be allowed to default. New York State will not allow this to happen. However, we cannot allow the margin in the marketplace between economic reality and these bonds to continue to grow. Each State must look at its own policies which brought about this occurrence. We do not need Federal assistance - in the form of flow control - in this matter. Individual State policies brought us to this point, and it is a reexamination of those policies, along with State financial assistance, which will result in a solution.

We would also like to address the issue of an interstate waste ban. In 1994, Congress considered H.R. 4779 (Boucher) The Local Government Interstate Waste Control Act, which would prohibit owners or operators of landfills, incinerators, or other waste disposal facilities from receiving

municipal solid waste generated outside their state unless they obtain authorization from the affected local government.

NYCOM opposed that legislation, and continues to oppose such a measure. Our position had the support of the New York Congressional delegation. Twenty-one New York members from both sides of the aisle signed a delegation letter opposing interstate restrictions during the 103rd Congress. All members of the New York Congressional delegation opposed the restrictions during House floor action last year.

We understand that states that seek to limit the interstate transportation of waste argue that some states should not be the dumping ground for others. The simple fact is that most states and the District of Columbia *both* import and export solid waste. In 1992, for example, 47 states exported waste and 42 states imported waste for other parts of the country. Interstate trade in waste occurs because communities and waste disposal companies are always looking for the least expensive and most efficient means of handling trash. Sometimes this means using a local incinerator or recycling facility, in other cases, it means hauling the waste to a landfill, perhaps one across state lines.

Enactment of an interstate waste ban would wreak havoc with any state's ability to dispose of its waste and would result in higher local property taxes to finance new disposal capacity to replace out-of-state markets. For New York, those out-of-state markets represent 20 percent of our waste stream.

Such legislation would fly in the face of Congress' current theme and action with regard to unfunded mandates. At a time when Congress and the Administration are rethinking the burden of mandates they impose on local governments, and limiting Federal management of local affairs, interstate municipal solid waste restrictions are contrary to those principles.

Interstate waste restrictions violate the Commerce Clause of the U.S. Constitution and have been repeatedly struck down by the courts. Limiting the transport of municipal solid

waste across state lines is anti-competitive and just doesn't make a lot of sense. Besides, what makes garbage so special? Once you allow local governments to define commerce, why stop with garbage? Why not ban radioactive material, gasoline, chemicals and other certainly more dangerous substances? Or perhaps move on to prohibit alcohol or cigarettes from entering a community.

Simply put, the transportation of garbage to a licensed disposal facility is a legitimate public and private activity. We see not reason for Congressional action in this matter.

Finally, interstate disposal restrictions would also hurt municipal solid waste disposal facilities in other states that depend upon imports for profit. Their investments and the size of their facilities have been based on the expectation of receiving out-of-state municipal solid waste. Restrictions would damage their business and leave little likelihood of replacing lost revenue with that generated from in-state waste.

I would like to thank Chairman Smith, Senators Lautenberg, Chafee and Baucus, and the members of the Subcommittee for providing NYCOM with the opportunity to testify here today. We stand ready to assist you in resolving this issue.

Testimony of Edward C. Farrell
Executive Director
New York State Conference of Mayors
and Municipal Officials

CONGRESSIONAL AUTHORIZATION OF FLOW CONTROL

Hearing before the

United States House of Representatives
Committee on Commerce
Subcommittee on Commerce, Trade and
Hazardous Materials

Subcommittee Chairman: Rep. Michael G. Oxley
Ranking Minority Member: Rep. W.J. "Billy" Tauzin

Thursday, March 23, 1995
9:30 o'clock a.m.
Rayburn House Office Building
Room 2123
Washington, D.C.

I am Edward C. Farrell, Executive Director of the New York State Conference of Mayors and Municipal Officials (NYCOM), which represents villages and cities in New York State.

I wish to extend my thanks to Rep. Michael G. Oxley, Chairman of the House Subcommittee on Commerce, Trade and Hazardous Materials and to Reps. Tauzin, Bliley, and Dingell, and to all of the members of the Committee and Subcommittee for the opportunity to offer testimony at this hearing exploring the issue of flow control.

I am testifying before you today because NYCOM represents that level of local government - cities and villages - most directly involved in the collection of solid waste, and thereby the most directly affected by flow control. Accordingly, we have a very different view of flow control than you may have heard from national local government associations.

Therefore, I want to state for the record, that the New York State Conference of Mayors opposes the imposition of flow control. Further, we ask that this Subcommittee and Congress take no action with regard to the imposition of flow control.

As you know, flow control refers to the statutory authority of a planning unit or municipality to exercise control over the flow of solid waste generated, originated, or brought within its jurisdiction. In the case of a county, multi-county, or regional facility, jurisdiction is granted over the flow of solid waste in the cities, towns and villages in that county. In the case of a town, jurisdiction is granted over the flow of solid waste in the villages in that town.

Flow control is not a new issue in New York. Since 1975, the New York State Legislature has enacted 38 special state laws enabling localities and solid waste management planning units to enact local flow control laws.

Flow control has been hailed by some as a necessary planning tool guaranteeing a steady flow of waste to a specific solid waste facility to finance the costs of that facility. In most cases, it is NYCOM's members - cities and villages - which are subsidizing these expensive facilities through corresponding increases in the local real property tax.

The issue of flow control came to the forefront in May, 1994 when the United States Supreme Court issued a sweeping decision which invalidated flow control legislation as violative of the Commerce Clause of the U.S. Constitution.

NYCOM served as an amicus curiae, along with the Long Island villages of Westbury, Mineola, and New Hyde Park, in *C & A Carbone, Inc. v. Town of Clarkstown,* on behalf of the hauler. We became involved in that case because our members are actively involved in the collection of solid waste, and thereby the most directly affected by flow control.

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currently financing their disposal costs through municipal taxes, while another 15 percent impose user fees.

Flow control adds unnecessary spending to a village or city's bottom line. While in New York, counties and some towns are legislatively charged with solid waste planning, that charge does not require that the county or town become the ultimate disposal site for all of the garbage generated within the jurisdiction.

The cost and its effect on municipal budgets can best be illustrated by the following examples.

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Even though flow control is usually justified in the name of financing construction of solid waste facilities adequate to a municipality's long term needs, the Town and Authority never implemented the original plan to build its own solid waste facility after five years of flow control. The Town and the Authority abandoned all such plans in early 1992 and subcontracted all solid waste functions, even though they had spent two and one-half years developing the plan, purchased 460-acres of property for $34 million, and pledged tipping fee revenues in a secured bank loan.

The end result is that these Long Island villages have experienced tipping fee increases from $66 per ton in 1990 to $104 per ton in 1992.

The villages and others in North Hempstead have been isolated from the solid waste disposal market and have been precluded from dealing with other governmental and private entities - such as American Ref-Fuel located in the neighboring Town of Hempstead - which would provide disposal services at a cost of at least $15 to $30 per ton below the Town's monopoly rates.

When the three villages defied North Hempstead's flow control law by contracting with American Ref-Fuel, they were subsequently sued by North Hempstead. NYCOM served as an amicus curiae in that case. Ultimately, the Court of Appeals upheld the validity of the State and Town of North Hempstead flow control laws.

The Village of Monticello

In 1992 Sullivan County was granted flow control. This was done to ensure that Sullivan County would capture all of the business within the county in order to make payments on the landfill construction bonds.

Due to its proximity to Pennsylvania and other solid waste landfills, the Village of Monticello has access to markets where tipping fees range from $25 to $40 per ton. Presently, Sullivan County charges $60 per ton to use the county landfill.

The Village of Monticello is now paying a tipping fee of $360,000 per year to the county. Costs continue to rise and required the Village Board to double the commercial sanitation rate and institute a monthly residential sanitation fee to cover tipping fee costs.

The bottom line is that flow control deprives local governments of a basic tenet of municipal home rule authority: the ability to make decisions on the local level in the best interest of the local citizenry. The ability to contract freely is essential

to the effective functioning of local governments. Municipal officials have a fiduciary duty to negotiate contracts and spend local funds judiciously, in accordance with our State Constitution. Municipal officials are constrained by the competitive bidding provisions of the New York State General Municipal Law. These provisions assure the prudent and economical use of public moneys for the benefit of all the inhabitants of the state and facilitate the acquisition of facilities and commodities of maximum quality at the lowest possible cost. Flow control flies in the face of these provisions and replaces them with a costly, inefficient, and anti-competitive mandate.

In May 1992 NYCOM called the attention of the State Legislature and the Governor to three bills which would grant flow control to specific counties. At that time, we stated that none of the special laws enacted to date, nor the three bills which were before the Legislature, provided local governments within those counties or towns any safeguards or protection from abuse of that flow control authority. We asked that future special state laws authorizing municipal flow control provide local governments within those jurisdictions with protection against price gouging, provide municipalities the authority to honor existing contracts with waste haulers, and require formal prior notification and negotiation between the level of municipal government seeking flow control and the localities within that jurisdiction. Neither the Legislature nor the Governor addressed our concerns before these bills were enacted.

Mr. Chairman, you will hear many groups and individuals testify today. Several will suggest that by striking down the Clarkstown law, the Supreme Court created a crisis for municipally-operated solid waste facilities. Perhaps it is more appropriate to question why in the 70's and 80's did states embark on policies to build facilities which are backed by revenue bonds, only to find out that these facilities are uncompetitive in the open marketplace of the 90's?

I submit, Mr. Chairman, that the crisis that many in the solid waste community perceive we are in today was in fact

created by particular State policies concerning solid waste. In New York, the perceived need for flow control was precipitated by the State's active policy to close landfills.

Since 1986, there has been a net loss of 244 landfills, or 83 percent of the active landfills. In 1993 alone, 35 landfills closed. There were 50 municipal solid waste landfills remaining in New York as of December 31, 1993. During approximately the same period, roughly 12 new landfills were opened.

We must not forget that in 1988, the New York State Department of Environmental Conservation re-wrote its regulations concerning solid waste disposal. At that time DEC boasted of the fact that the new regulations were now the most stringent in the county - and accordingly disposal costs would increase by 1/3. Having the cadillac of regulations may work in a monopoly, but perhaps they are not well suited to a free enterprise situation.

What are the alternatives now that the U.S. Supreme Court has held that flow control laws violate the Commerce Clause? The Court noted that if special financing were needed to ensure a transfer station's survival, the municipality may subsidize the facility through general taxes or municipal bonds. But, the Court said, having elected to use the open market to earn revenues for a project, a municipality may not employ discriminatory regulation to give that project an advantage over rival businesses from out of state.

What is the effect of the *Carbone* decision in New York State? A number of planning units have reduced tipping fees to a competi tive level to retain current business and attract new customers. In the case of solid waste authorities, several are actively negotiating with the municipalities under their jurisdiction to subsidize their costs and foster cooperation. Some planning units and municipalities have chosen to ignore the high court's decision and are continuing to enforce flow control. They are facing lawsuits by industry and others.

We understand that there are several legislative initiatives in the House of Representatives which address the issue of flow control authorization. We would like to discuss H.R. 1085 and H.R. 1180.

The first bill, H.R. 1085 (Smith), also known as the "systems" bill, would "grandfather" local laws, plans or agreements containing flow control authority that existed prior to May 15, 1994, the date of the *Carbone* decision. This legislation is very broad as it would provide protection to some facilities that did not even exist or were not planned prior to May 15, 1994. Pursuant to this bill, a community would have three years to designate a facility, and then an unspecified amount of time to construct it, after which flow control could be chosen by the local government in perpetuity. Additionally, this proposal provides that up to 49% of flow control revenues can be used for municipal services unrelated to municipal solid waste management.

The second initiative, H.R. 1180 (Upton), also known as the "facilities" bill, is more restrictive, and would grandfather only those facilities for which revenue bonds were sold prior to May 15, 1994. Pursuant to this proposal, flow control authority would last only for the life of the facility that was built or in development before May 15, 1994. After that time, free market principles would apply. This proposal also provides congressional authorization for restrictions on the receipt of out-of-State municipal solid waste and for State control over transportation of municipal solid waste.

We oppose any form of legislation which would result in congressional authorization of flow control, therefore, we oppose the aforementioned proposals. We ask that this Subcommittee and Congress take no action with regard to the imposition of flow control. We ask that Congress take no action on the aforementioned proposals.

The end of flow control does not mean the end of municipally-operated solid waste facilities. It does, however, mean the end of monopolistic prices for waste services and the return to a free market system. The *Carbone* decision is but

nine months old, it is premature to do anything but assess its effects nationwide.

The real issue that needs to be addressed is how do we retire the bonds that have been issued on the debt of uncompetitive facilities? If Congress enacts flow control, and New York State follows suit, bonds issued for New York facilities will continue to be retired by increases in the local real property tax. This is a practice which we find unacceptable. There are alternatives such as state subsidies which could make up the difference between what is viable in the marketplace and the funds necessary to retire the debt.

State financial assistance for solid waste facilities is not unprecedented. In the past, New York State has provided funds for the construction of such facilities. It would not be extraordinary for New York to use state funds to retire the bonds on these same facilities. The assistance would not have to be 100 percent of the outstanding debt, but could rather reflect the difference between a competitive tipping fee and the outstanding obligation. The State offers a broad tax base from which to help finance such a program, including various income, corporate, sales and business use taxes, to name a few. Of course, if the federal government is interested in providing funds for this purpose, we would be most appreciative.

It is clear that bonds issued on the debt of uncompetitive facilities cannot be allowed to default. New York State will not allow this to happen. However, we cannot allow the margin in the marketplace between economic reality and these bonds to continue to grow. Each State must look at its own policies which brought about this occurrence. We do not need Federal assistance - in the form of flow control - in this matter. Individual State policies brought us to this point, and it is a reexamination of those policies, along with State financial assistance, which will result in a solution.

While we understand that this issue will be the subject of a second hearing, we would also like to address the issue of an interstate waste ban. In 1994, Congress considered H.R. 4779 (Boucher) The Local Government Interstate Waste Control

Act, which would prohibit owners or operators of landfills, incinerators, or other waste disposal facilities from receiving municipal solid waste generated outside their state unless they obtain authorization from the affected local government.

NYCOM opposed that legislation, and continues to oppose measures such as H.R. 1180, which combines flow control authority with a waste ban. During the last session of Congress, our position had the support of the New York Congressional delegation. Twenty-one New York members from both sides of the aisle signed a delegation letter opposing interstate restrictions during the 103rd Congress. All members of the New York Congressional delegation opposed the restrictions during House floor action last year.

We understand that states that seek to limit the interstate transportation of waste argue that some states should not be the dumping ground for others. The simple fact is that most states and the District of Columbia *both* import and export solid waste. In 1992, for example, 47 states exported waste and 42 states imported waste for other parts of the country. Interstate trade in waste occurs because communities and waste disposal companies are always looking for the least expensive and most efficient means of handling trash. Sometimes this means using a local incinerator or recycling facility, in other cases, it means hauling the waste to a landfill, perhaps one across state lines.

Enactment of an interstate waste ban would wreak havoc with any state's ability to dispose of its waste and would result in higher local property taxes to finance new disposal capacity to replace out-of-state markets. For New York, those out-of-state markets represent 20 percent of our waste stream.

Such legislation would fly in the face of Congress' current theme and action with regard to unfunded mandates. At a time when Congress and the Administration are rethinking the burden of mandates they impose on local governments, and limiting Federal management of local affairs, interstate municipal solid waste restrictions are contrary to those principles.

Interstate waste restrictions violate the Commerce Clause of the U.S. Constitution and have been repeatedly struck down by the courts. Limiting the transport of municipal solid waste across state lines is anti-competitive and just doesn't make a lot of sense. Besides, what makes garbage so special? Once you allow local governments to define commerce, why stop with garbage? Why not ban radioactive material, gasoline, chemicals and other certainly more dangerous substances? Or perhaps move on to prohibit alcohol or cigarettes from entering a community.

Simply put, the transportation of garbage to a licensed disposal facility is a legitimate public and private activity. We see not reason for Congressional action in this matter.

Finally, interstate disposal restrictions would also hurt municipal solid waste disposal facilities in other states that depend upon imports for profit. Their investments and the size of their facilities have been based on the expectation of receiving out-of-state municipal solid waste. Restrictions would damage their business and leave little likelihood of replacing lost revenue with that generated from in-state waste.

I would like to thank Chairman Oxley, Reps. Tauzin, Bliley and Dingell, and the members of the Subcommittee for providing NYCOM with the opportunity to testify here today. We stand ready to assist you in resolving this issue.